

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NANG SAM,

Appellant.

No. 33324-4-II

UNPUBLISHED OPINION

Hunt, J. – Nang Sam appeals his guilty plea convictions of second degree unlawful possession of a firearm, first degree stolen property, and forgery. He argues that his first degree stolen property and forgery pleas were invalid because there was no factual basis for these pleas. We affirm.

FACTS

The State originally charged Sam with second degree unlawful possession of a firearm (count I); possession of a stolen firearm (count II); two counts of second degree possession of stolen property based on his possession of stolen access devices, specifically cash advance credit card checks issued to J. Iachini and M. A. Ramos (counts III and IV); and forgery (count V). Each of the possession of stolen property charges included a firearm enhancement.

The declaration for determination of probable cause supporting these charges alleged the

following facts:

In December 2004 the Pierce County residence of victim Daranouvong was burglarized. An investigation into that case was conducted by the Pierce County Sheriff's Department under incident number 050120987. Among the items taken during the burglary were checks belonging to the victim.

On December 27, 2004, SAM entered Sound Credit Union, at 1331 Broadway Plaza, and presented one of the victim's checks, apparently endorsed and payable to SAM. SAM identified himself at the time he presented the check by Washington State Driver's License. Video surveillance in the credit union confirmed SAM'S identity. The credit union cashed the check and paid SAM \$550. Subsequently, the burglary was discovered and the victim completed an affidavit of forgery. Tacoma Police began an investigation into the forgery using incident number 050540784.

On March 18, 2005, Tacoma Police notified their field force that there was probable cause to arrest SAM for forgery. On March 28, 2005, Tacoma Police conducted a traffic stop on a car associated with and being driven by SAM in the 4000 block of Warner Street. As officers conducted the stop they observed SAM making furtive movements by leaning back and forth and reaching forward.

Behind the front passenger seat of SAM'S car officers found a gun holster. Under the front driver's seat officers found a loaded 9mm handgun. A records check showed that the gun was reported stolen out of Lacey under incident number 050001690. Also located in the . . . car were cash advance credit card checks belonging to J. Iachini and separate checks belonging to M. A. Ramos. Neither Iachini nor Ramos were passengers in SAM'S car.

A criminal history check showed that SAM had previously been convicted of the felony offense of unlawful possession of a controlled substance (methamphetamine).

Clerk's Papers at 4.

Following plea negotiations, the State filed an amended information charging Sam with second degree possession of a stolen firearm (count I), first degree possession of stolen property based on his possession of cash advance credit card checks belonging to J. Iachini with a value in excess of \$1,500 (count III), and forgery (count V). None of these charges included a firearm enhancement.

Sam entered a straight guilty plea to the second degree unlawful possession of a firearm

charge and *Alford/Newton*¹ pleas to the first degree possession of stolen property and forgery charges. In his statement of defendant on plea of guilty, he asserted that, although he did not believe the value of the stolen property exceeded \$1,500, he believed he would likely be found guilty of the possession of stolen property and forgery charges.

After reviewing Sam's statement on plea of guilty and discussing the plea with him, the trial court reviewed the declaration of probable cause that accompanied the original information and questioned Sam about the factual bases of his pleas. Sam stated that he understood the elements of all three remaining charges, and confirmed that he had gone over the evidence with his counsel, believed there was a substantial likelihood he would be convicted, and was entering the pleas so he could take advantage of the State's plea offer. Sam's counsel also informed the trial court that Sam was taking advantage of the plea bargain because, "[E]ither [of] these charges or multiple other counts could result in far more a serious consequence"; and Sam acknowledged that he understood this. Report of Proceedings at 8.

The trial court found that there was a factual basis for the pleas and accepted them.² Sam appeals.

ANALYSIS

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution); *see also State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

² At the sentencing hearing that immediately followed, the State recommended concurrent sentences of 29 months on the second degree unlawful possession of a firearm conviction, 18 months on the first degree possession of stolen property conviction, and 18 months on the forgery conviction. These sentences were all the high end of the standard range for each offense. Defense counsel concurred in this recommendation, and the trial court adopted the State's recommendation.

Sam argues that (1) there was no factual basis for his forgery plea because nothing in the record established that he was the person who completed the forged check or that he knew the check he cashed was stolen; and (2) there was no factual basis for the first degree possession of stolen property plea because nothing in the record established that the value of the cash advance credit card checks belonging to J. Iachini exceeded \$1,500, that the checks were stolen, or that he (Sam) knew the checks were stolen. These arguments fail.

“An *Alford/Newton* plea allows a defendant to plead guilty in order to take advantage of a plea bargain even if he or she is unable or unwilling to admit guilt.” *State v. Zhao*, 157 Wn.2d 188, 197-98, 137 P.3d 835 (2006)³ (citing *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976) (citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970))). Although a defendant entering such a plea does not admit guilt, “CrR 4.2(d)^[4] [still] requires that the trial court find a factual basis supporting the plea.” *Zhao*, 157 Wn.2d at 198. “[T]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty; there must only be sufficient evidence,

³ We note that, although we rely heavily on *Zhao* in our later analysis, the parties did not have the opportunity to address *Zhao* because this decision was not issued until June 29, 2006, well after the briefing in this case was complete.

⁴ CrR 4.2(d) provides:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

from any reliable source, for a jury to find guilt.”” *Zhao*, 157 Wn.2d at 198 (quoting *Newton*, 87 Wn.2d at 370).

I. Forgery: Failure to Preserve Factual Basis Challenge

Ordinarily, we do not address issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The rules of appellate procedure provide an exception for “manifest error affecting a constitutional right.” RAP 2.5(a)(3). The only constitutional significance in determining whether a factual basis exists relates to a defendant’s understanding of his plea and, thus, to the voluntariness of the plea. *In re Personal Restraint of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987). When properly preserved for direct appeal, a missing factual basis can require reversal. *See State v. Zumwalt*, 79 Wn. App. 124, 129-32, 901 P.2d 319 (1995), *overruled in part on other grounds by State v. Bisson*, 156 Wn.2d 507, 520 n.5, 130p3 820 (2006).

Although CrR4.2(d) requires a trial court to be “satisfied that there is a factual basis for the plea,” this requirement is not a constitutional requirement. *Hews*, 108 Wn.2d at 591-92. Sam did not challenge the factual basis of the forgery plea below, and he does not otherwise assert that his plea to that charge was not voluntary, intelligent, and knowing. Accordingly, he has failed to preserve this issue for review and he is not entitled to relief on this basis.

II. Possession of Stolen Property: Sufficient Factual Basis

Sam did, however, arguably challenge the factual basis for his first degree possession of stolen property plea when he asserted that he did not believe the value of the cash advance credit card checks at issue exceeded \$1,500. We agree with Sam that there is nothing in the record

regarding the value of the property at issue. But that alone does not justify relief.

To determine whether an *Alford/Newton* plea to an amended charge not supported by a factual basis is valid, we must examine whether the defendant was aware of the technical infirmity of the amended charge, whether there was a sufficient factual basis for the original charge, and whether the defendant's plea to the amended charges was knowing, intelligent, and voluntary. *Zhao*, 157 Wn.2d at 190, 200, 204 (citing *In re Personal Restraint of Barr*, 102 Wn.2d 265, 270, 684 P.2d 712 (1984)). Apart from asserting there was no factual basis, Sam fails to assert that his plea was not knowing, intelligent, and voluntary.

Moreover, the plea colloquy and statement of defendant on plea of guilty support the conclusion that Sam's plea met these requirements. Sam's objection to the lack of factual basis for the value of the stolen property establishes that he was aware of the potential defect in the amended charge. And the record clearly shows that, despite this knowledge, he pleaded guilty to this charge in order to gain the benefit of the plea agreement and to avoid the potentially greater consequences should he be found guilty of the original charge, which would have included a firearm sentencing enhancement.

The only remaining question is whether there was a factual basis for the original charge. The original charge was for second degree possession of stolen property with a firearm enhancement, for possessing a stolen access device, namely cash advance credit card checks issued to Iachini.⁵ The record clearly provides a factual basis for the firearm enhancement

⁵ RCW 9A.56.160(1)(c) provides that "[a] person is guilty of possessing stolen property in the second degree if . . . [h]e or she possesses a stolen access device[.]"

"Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to

because Sam was found in possession of the stolen property and the firearm at the same time.

We now turn to whether there was a factual basis for the second degree possession of stolen property charge itself. To establish possession of stolen property, the State had to show that Sam knowingly received, retained, possessed, concealed, or disposed of stolen property knowing and that he knew the property was stolen. RCW 9A.56.140(1). “When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons . . . he or she is presumed to know that they are stolen.” RCW 9A.56.140(3). Sam possessed access devices issued in the names of two or more persons; thus, if there is a factual basis for finding that these access devices were stolen, his knowledge is presumed.

When the police arrested Sam, (1) he possessed at least two access devices that were not in his own name, and the owners of these access devices were not with him; (2) he had also recently cashed a stolen and forged check belonging to yet a third victim; and (3) he was in possession of a stolen firearm. These facts provide sufficient circumstantial evidence to allow a jury to find that the access devices were stolen. Thus, there was a factual basis for the original second degree possession of stolen property charge and enhancement, and the trial court did not err when it found a factual basis for the plea to the amended charge.

initiate a transfer of funds, other than a transfer originated solely by paper instrument.
RCW 9A.56.010. Sam does not argue that the cash advance credit card checks were not access devices.

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Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.